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November 23, 2004

Jan Witold Baran
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Jeff S. Jordan, Esq.
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Matter Under Review 5569

Dear Mr. Jordan:

This letter responds to the complaint filed by the National Republican Congressional Committee against the KFI-AM-640 radio station for news coverage and editorial commentary regarding the voting record of Congressman David Dreier on immigration issues and his campaign for re-election. For the reasons outlined below, the complaint must be dismissed pursuant to the "press exemption" of the Federal Election Campaign Act of 1971, as amended ("FECA").

About The KFI-AM Radio Station

KFI-AM is a broadcast radio station operating on 640 kHz in Burbank, California.¹ KFI began broadcasting in 1922. KFI's 24-hour per day programming features regular news reports every hour, half-hour, and live reports for breaking news.² KFI reporters and anchors have won more than 25 awards over the past decade for excellence in reporting.³ KFI programming also features 17 talk radio shows, including politically-oriented and socially-conscious programs such as *The Rush Limbaugh Show*, *Dr. Laura*, *The John Ziegler Show*, *Handel on the Law*, *The American Soldier* hosted by Captain Dale Dye, *The Drudge Report* hosted by Matt Drudge, and *The John and Ken Show*.⁴ KFI also disseminates its news and

¹ See Exhibit 1, Affidavit of Robin Bertolucci at ¶ 2 ("Bertolucci Aff.").

² See Bertolucci Aff. at ¶ 3.

³ See Bertolucci Aff. at ¶ 3.

⁴ See www.kfi640.com (listing featured radio programs).

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commentary programming via the Internet at www.kfi640.com, which posts print news reports⁵ and editorials⁶ and streams radio programs for online listening.⁷

KFI is owned by Capstar Radio Operating Company ("Capstar").⁸ Capstar owns the operating assets of approximately 474 radio stations in the United States. Capstar's subsidiary holds KFI's Federal Communications Commission license.

Capstar is a wholly-owned indirect subsidiary of Clear Channel Communications, Inc. ("Clear Channel"). Clear Channel is a leading global media company which owns or operates radio stations in over 60 countries.⁹ Clear Channel operates approximately 1,182 radio and 37 television stations in the United States. In addition to operating approximately 125 news bureaus throughout the country, Clear Channel owns Clear Channel News Network which operates news networks in eight states.

Editorial control over KFI programming is exercised by KFI's Program Director, Robin Bertolucci.¹⁰ KFI employs a news staff of twenty journalists. The individual hosts of talk radio programs broadcast by KFI determine the content of each program. Neither KFI, Capstar or Clear Channel is owned or controlled by any political party, candidate or political committee.¹¹

About The John And Ken Show

The John and Ken Show is hosted by radio journalists John Kobylt and Ken Chiampou. Mr. Kobylt and Mr. Chiampou created *The John and Ken Show* in 1992

⁵ See www.kfi640.com/news/nnews.

⁶ See www.kfi640.com/news/opinion.

⁷ See www.kfi640.com/interactive/streaming.

⁸ See Bertolucci Aff. at ¶ 2.

⁹ See Bertolucci Aff. at ¶ 2.

¹⁰ See Bertolucci Aff. at ¶ 5.

¹¹ See Bertolucci Aff. at ¶ 5.

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and have served as its co-hosts since the show's inception.¹² KFI has broadcast *The John and Ken Show* since 1992, except for a two-year period from 1999 to 2001.¹³ KFI broadcasts *The John and Ken Show* each weekday from 3 pm to 7 pm (PST). KFI's website also links to *The John and Ken Show*'s website, www.johnandkenshow.com, which publishes news and editorial commentary and archives radio programs for online listening. Mr. Kobylt and Mr. Chiampou are under an exclusive contract with KFI to produce and host the show.¹⁴

The John and Ken Show covers, among other social and cultural topics, current events, politics and public policy. Past programs have focused on Proposition 66 (California's referendum on "three-strikes-and-you're-out" legislation), the recall of Governor Gray Davis, the election of Governor Arnold Schwarzenegger, prominent criminal trials, tax policy, and a host of other newsworthy topics. The show frequently is broadcast on-location and stages events or devices to enhance its commentary and public appeal.¹⁵

One topic that has been the focus of continuing news and editorial coverage is illegal immigration, the resulting demand for public services by non-citizens, and the costs imposed upon California taxpayers.¹⁶ In July of 2004, *The John and Ken Show* initiated a series of commentaries entitled "The Political Human Sacrifice." The theme of the program was to interview several elected officials and identify one Republican and one Democratic Congressman who, in the opinion of Mr. Kobylt, Mr. Chiampou and listeners, had most supported policies promoting illegal immigration to the United States and then to criticize that official and editorialize against his re-election to office. In this context, *The John and Ken Show*

¹² See Exhibit 2, Affidavit of John Kobylt at ¶ 2 ("Kobylt Aff.").

¹³ See Bertolucci Aff. at ¶ 4; Kobylt Aff. at ¶ 2.

¹⁴ See Kobylt Aff. at ¶ 5.

¹⁵ See Kobylt Aff. at ¶ 3.

¹⁶ See www.johnandkenshow.com/index.php?m=200406 (news postings on immigration policy).

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editorialized in opposition to the re-election of Rep. David Dreier (R) and Rep. Joe Baca (D), among others.¹⁷

Allegations In The Complaint

The complaint filed by the National Republican Congressional Committee alleges that KFI (or its corporate owners) made illegal corporate expenditures or contributions to the campaign of the Democratic candidate for California's 26th Congressional District, Cynthia Matthews, or illegally funded "electioneering communications," by broadcasting the following content:

- ❑ Editorial comments opposed to the election of Rep. Dreier or in favor of Cynthia Matthews, or otherwise unfavorable toward Rep. Dreier's record on illegal immigration policy;
- ❑ A live broadcast of *The John and Ken Show* across the street from Rep. Dreier's district office;
- ❑ Interviews of Cynthia Matthews in which Ms. Matthews was permitted to state her campaign's website address and street address;
- ❑ Posting editorial comments opposed to the election of Rep. Dreier or in favor of Cynthia Matthews, or information critical of Rep. Dreier's record on illegal immigration on the show's website (www.johnandkenshow.com).

There is no allegation that KFI or *The John and Ken Show* is owned or controlled by a political party, candidate or other political committee. The complaint does not allege that the show was disseminated through any media other than the broadcast and Internet-based facilities of KFI. The complaint does not mention the fact that KFI's website also posted or linked to press and editorial commentary favorable to Rep. Dreier¹⁸ or that the co-hosts read favorable editorials and letters supportive of

¹⁷ See, e.g., www.johnandkenshow.com/audi.php?offset=O&per-page=50 (archives for Sept. 16, 2004 and Sept. 9, 2004).

¹⁸ See www.kfi640.com/prodreier (posting letters to the *Pasadena Star News* expressly advocating the election of Rep. David Dreier).

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Rep. Dreier on the air.¹⁹ The complaint does not mention Rep. Dreier's many interviews on *The John and Ken Show* and his own on air electoral advocacy in favor of the election of Arnold Schwarzenegger as Governor of California and the recall of Governor Gray Davis.²⁰ Nor does the complaint take issue with any press commentary or editorials urging citizens to vote *for* Rep. Dreier, including those posted or linked on Rep. Dreier's campaign website.²¹

KFI's Broadcasts Of The John And Ken Show Are Exempt From Regulation Under The "Press Exemption"

All of the allegations in the complaint relate to the content and broadcasting of a *bona fide* radio talk show that is exempt from regulation by the Federal Election Commission (FEC) under the well-established "press exemption," which provides:

The term "expenditure" does not include any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. § 431(9)(B)(i). FEC regulations make clear that the press exemption applies to three relevant categories of regulated communications. 11 C.F.R. §§ 100.29(c)(2) (exception to restrictions on electioneering communication) & 100.73

¹⁹ See Kobylt Aff. at ¶ 7.

²⁰ See Kobylt Aff. at ¶ 7.

²¹ See, e.g., www.dreier2004.org/endorsements (posting favorable press reports about Rep. Dreier and republishing the editorial "Dreier Merits Another Term" from the *San Gabriel Valley Tribune* which opines: "When voters go to the polls Nov. 2, voters should choose the candidate who will do the most good for the Valley. Without a doubt, that choice is Republican David Dreier. ... *In the 26th Congressional District, David Dreier is the right choice*") (emphasis in original); see also, "Dreier Merits Another Term," *Pasadena Star-News* (Oct. 21, 2004) (posted online at www.pasadenastarnews.com/Stories/0,1413,206~11851~2483336,00).

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(exception to definition of contributions) & 100.132 (exception to definition of expenditures).

Legislative history indicates that Congress was concerned about not interfering with the media's core First Amendment right to comment upon political matters when it adopted the FECA and this concern led it to adopt the "media exemption":

[I]t is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.

H.R. Rep. No. 93-1239, 93d Congress, 2d Sess. at 4 (1974).²²

Federal courts that have addressed the "press exemption" of the FECA have adopted a two-step analysis in the case of media organizations not controlled by political parties or candidates. *See FEC v. Phillips Publishing*, 517 F.Supp. 1308, 1312 (D.D.C. 1981); *Readers Digest Assoc. v. FEC*, 509 F.Supp. 1210, 1214 (S.D.N.Y. 1981). The initial inquiry is whether the entity is a *bona fide* press or media entity. If so, the second inquiry is whether the press entity is acting as a press entity in producing and disseminating news, editorials or political commentary, also referred to as performing a "legitimate press function." *Phillips Publishing*, 517 F.Supp. at 1313; *see also*, FEC Advisory Opinion 2003-34 (Viacom and Showtime).

KFI's broadcasts of *The John and Ken Show*, including its references to Rep. Dreier and its editorial comment upon his record on immigration policies and qualifications for election to office satisfy this test. First, KFI is a *bona fide* media

²² The Supreme Court has held that radio programs are protected by the First Amendment. "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v. Mount Ephraim*, 452 U.S. 61, 65 (1981); *see also*, *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment").

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organization. Second, KFI disseminated *The John and Ken Show* through its broadcast facilities and website as part of legitimate talk radio programming.

This conclusion is supported by a long line of FEC precedents interpreting the "press exemption" quite broadly. The press exemption includes, for example, the provision of free and unfettered airtime to actual candidates and political parties to expressly advocate their candidates. The FEC has applied the exemption to cable, satellite and broadcast television stations donating free television time to federal candidates and the national political parties to expressly advocate their candidacies and solicit financial contributions unfiltered by journalists. See FEC Advisory Opinions 1998-17 (Daniels Cablevision) & 1982-44 (Turner Broadcasting and WTBS). The FEC has applied the exemption to a newspaper that provided free space to federal candidates to promote their candidacies. See FEC MUR 486. And the FEC has afforded the exemption to a webcaster's gavel-to-gavel coverage of the national party conventions, see FEC Advisory Opinion 2000-13 (EXBTv and iNEXTV), as well as to a webcaster's "electronic town hall" linking presidential candidates directly to the webcaster's subscribers. See FEC Advisory Opinion 1996-16 (Bloomberg media affiliates). The FEC has applied the "editorial" and "commentary" exemptions to Garry Trudeau's "Doonesbury" cartoon which published presidential candidate Jerry Brown's "1-800" campaign phone number (FEC MUR 3500), CBS's *60 Minutes* (FEC MUR 3931), *Flower & Garden* magazine (FEC MUR 3660), Northwest Airline's in-flight magazine *WorldTraveler* (FEC MUR 3607), a Boston PBS station's broadcast of the documentary *Mr. Speaker* featuring candidate Thomas P. O'Neill, Jr. (FEC MUR 819), a CBS News affiliate's broadcasted endorsement of a senatorial candidate (FEC MUR 657), the *Houston Chronicle's* printed endorsement of a candidate (FEC MUR 852), and to the Showtime's Network's production and exhibition of the fictional *American Candidate* series featuring appearances by and express advocacy for real federal candidates on both cable television and the Internet. See FEC Advisory Opinion 2003-34 (Viacom and Showtime).

Of particular relevance here, the FEC concluded that WABC-AM's broadcast of express advocacy on *The Sean Hannity Show* was exempt from regulation. See FEC MUR 4863. There, radio talk show host Sean Hannity had advocated the re-election of Senator Alfonse D'Amato, the defeat of his challenger Charles Schumer, and replayed D'Amato's campaign advertisements on New York radio over several weeks in October of 1998. The FEC voted 6-0 to dismiss the complaint, consistent with the General Counsel's conclusion that "the commentary apparently broadcast

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on the Sean Hannity Show would appear to be squarely within the 'legitimate press function' of WABC-AM." MUR 4863, First General Counsel's Report, p. 9 (May 27, 1999).

The FEC reached the same conclusion in response to a complaint filed against WBT Radio of Charlotte, North Carolina for broadcasting *The Rush Limbaugh Show*, which featured regular editorial comment supporting the re-election of President George H. W. Bush in 1992. See FEC MUR 3624. And in MUR 1212, the FEC concluded that the press exemption protected *The Deena Clark Show* broadcasted by KXAS-TV in Fort Worth, Texas, when it featured a flattering interview of then-Majority Leader Jim Wright under sponsorship of Texaco, Inc. See FEC MUR 1212.

As the FEC noted in Advisory Opinion 1982-44:

Although the statute and regulations do not define "commentary," the Commission is of the view that commentary cannot be limited to the broadcaster. The exemption already includes the term "editorial" which applies specifically to the broadcaster's point of view. In the opinion of the Commission, "commentary" was intended to allow third persons access to the media to discuss issues. The statute and regulations do not define the issues permitted to be discussed or the format in which they are to be presented under the "commentary" exemption nor do they set a time limit as to the length of the commentary.

FEC Advisory Opinion 1982-44. In addition to the absence of any time or format restrictions on editorials and commentary, the FECA does not restrict the "frequency" of airing news, editorials or commentary programs discussing specific candidates. "[N]o provision of the FECA restricts the frequency that a particular news program can be broadcasted before it is considered as a contribution or expenditure ... [frequency] does not moot the exemption afforded to such programs." MUR 1285, (KELO-TV and Midcontinent Broadcasting, Inc.), First General Counsel's Report, p. 3 (Oct. 9, 1980).

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Conclusion

KFI's broadcast of *The John and Ken Show* and its editorial comment upon politics is a legitimate press function by a *bona fide* media entity. Therefore, the FEC must dismiss the complaint pursuant to the "press exemption" of 2 U.S.C. § 431(9)(B)(i), corollary FEC regulations, and a well-established body of precedents. We respectfully request that the Commission find no reason to believe that there has been a violation of FECA.

Sincerely,



Jan Witold Baran
Lee E. Goodman

Enclosures (Exhibits 1 & 2)

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EXHIBIT 1

**BEFORE THE
FEDERAL ELECTION COMMISSION**

Re: KFI-AM 640, John Kobylt, Ken Chiampou) MUR 5569
)
)

Affidavit of Robin Bertolucci

1. My name is Robin Bertolucci. I am the Program Director for KFI-AM Radio Station, a respondent in Matter Under Review 5569.

2. KFI-AM 640 ("KFI") is a broadcast radio station located in Burbank, California. KFI has been in the broadcast radio business since 1922. KFI is owned by Capstar Radio Operating Company ("Capstar"), a Delaware media company, which owns the operating assets of approximately 474 radio stations in the United States. Capstar is a wholly-owned, indirect subsidiary of Clear Channel Communications, Inc., a leading global media company which owns or operates approximately 1,182 radio stations and 37 television stations in the United States. Clear Channel also owns 125 news bureaus across the United States and owns Clear Channel News Networks which operates news networks in eight states. KFI broadcasts pursuant to a Federal Communications Commission license issued to Capstar subsidiary Capstar TX Limited Partnership on 640 kHz. KFI also streams its programs for listening on the web at www.kfi640.com/interactive/streaming.

3. KFI is a news and talk radio station. KFI has a news staff of 20 broadcast journalists. KFI airs live local news every hour, half hour, and when there is breaking news. KFI's reporters and anchors have won more than 25 awards over the past decade for excellence in reporting. KFI was named News & Talk Radio Station of the Year for 2004 by *Radio & Records* magazine. KFI also broadcasts 17 talk radio shows hosted by several prominent commentators. These shows cover current events, public policy, law, military affairs, politics, sports, culinary arts, and


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religion. KFI also posts national and local news stories and editorials on its website at www.kfi640.com.

4. KFI has broadcast *The John and Ken Show* since 1992, with the exception of the period from March 1999 to April 2001. The hosts of this program are John Kobylt and Ken Chiampou. Mr. Kobylt and Mr. Chiampou are under exclusive contract with KFI to produce and host the show, which airs each weekday afternoon. KFI carries the program because it provides listeners thought-provoking opinion and discussion on newsworthy events and issues to the public. *The John and Ken Show* is the number one rated afternoon radio show in the metropolitan Los Angeles area (Spring 2004, Average Quarterly Hour, 25-54 year olds, 3-7 p.m. time block).


5. KFI, Capstar, Clear Channel and *The John and Ken Show* are not owned or controlled by any political party, candidate or other political committee. All programming decisions at KFI are under my direction. Editorial decisions for news and programs are determined by the respective journalists and hosts. The opinions expressed on *The John and Ken Show* are those of Mr. Kobylt and Mr. Chiampou as well as the public figures they interview and the citizens who call the program.

Under penalty of perjury and any other penalties possibly applicable under law, I swear that the foregoing statements are true to the best of my knowledge, belief, and recollection, and after due investigation of all my records.

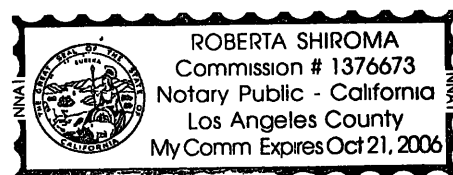

Robin Bertolucci

11/22/04
Dated

Sworn and subscribed to
Before me this 22nd day of
November, 2004.


Notary Public

My Commission expires Oct 21, 2006



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EXHIBIT 2

**BEFORE THE
FEDERAL ELECTION COMMISSION**

Re: KFI-AM 640, John Kobylt, Ken Chiampou) MUR 5569
)
)

Affidavit of John Kobylt

1. My name is John Kobylt. I have been the co-host and co-producer of *The John and Ken Show* with Ken Chiampou since January of 1992.
2. *The John and Ken Show* has aired on five different radio stations since its inception and was syndicated nationally from 1997 to 1999. *The John and Ken Show* has been broadcast on the KFI-AM radio station since 1992, with the exception of the period from March 1999 to April 2001. KFI-AM operates on 640 kHz and also can be heard on the Internet at www.kfi640.com. *The John and Ken Show* is broadcast live each weekday from 3 p.m. to 7 p.m. (PST).
3. *The John and Ken Show* is a live talk radio program. We also publish our editorial comment and archive excerpts from some of our radio shows on the show's website, www.johnandkenshow.com. My co-host, Ken Chiampou, and I express our opinions on a wide range of issues, including current events, movies, public policy, politics and elections. Listeners call in and express their own opinions. We regularly interview a wide range of public officials and politicians live on the show. We produce our show from a variety of locations. Some are broadcast from KFI studio in Burbank, California. Others are broadcast on location at sites related to a topic to be discussed on our show. These venues have included a live "recall rally" broadcast at the office of then-Governor Gray Davis in the Fall of 2002 to discuss the Governor's performance in office and a statewide recall effort, a live "election day rally" show to call attention to criminal accusations about Judge Ronald Kline in November of 2002, and a

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broadcast "rally" in Orange County, followed by a caravan to Sacramento, to editorialize against a proposed SUV tax in August of 2002. *The John and Ken Show* broadcast numerous live shows in public places to encourage listeners to sign petitions opposing a car tax and vehicle license fees, and four live shows from September 2003 to November 2003 to oppose driver's licenses for illegal immigrants. *The John and Ken Show* broadcast an "anti-tax rally" in front of New Jersey's state capitol attended by approximately 10,000 listeners. We broadcast the show live from the Democratic National Convention in Los Angeles in 2000 and from the Republican National Convention in San Diego in 1996. These live events call attention to newsworthy public issues and enhance our editorial commentary.

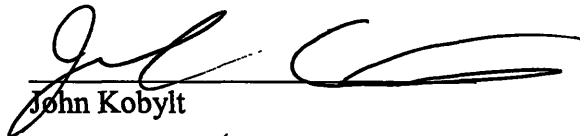
4. Mr. Chiampou and I make all editorial decisions regarding the content of our programs, subject only to editorial input from KFI-AM radio station and the extemporaneous, unscripted comments of the people we interview on air and those who call in.

5. Mr. Chiampou and I are under an exclusive contract with KFI-AM to produce and host *The John and Ken Show*. Neither of us is employed by or is a consultant to any political party, campaign committee or other political committee.

6. From June to October of 2004, Mr. Chiampou and I invited several public officials, candidates, and candidate representatives to be interviewed on our show. Among those we interviewed were Rep. Mary Bono, Rep. Chris Cox, Rep. Darrell Issa, Bush campaign manager Ken Mehlman, and Cynthia Matthews, the Democratic candidate for the 26th Congressional District seat. We also invited Rep. David Dreier to be interviewed on *The John and Ken Show* on many occasions. We extended invitations on air, on our website, and by calling his office. We offered Rep. Dreier unlimited time on our show to discuss public policy. Rep. Dreier did not accept any of our invitations.

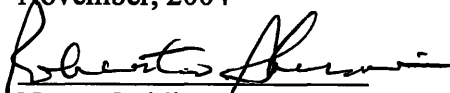
7. During the Fall of 2004, Ken and I read favorable letters and editorials about Rep. Dreier and discussed them on air. On several occasions in 2002 and 2003, Rep. Dreier, who served as co-chairman of Arnold Schwarzenegger's gubernatorial campaign, was interviewed on *The John and Ken Show* to discuss the recall of Governor Gray Davis and to advocate the election of Arnold Schwarzenegger.

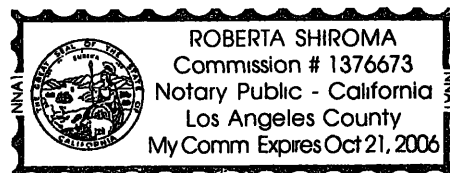
Under penalty of perjury and any other penalties possibly applicable under law, I swear that the foregoing statements are true to the best of my knowledge, belief, and recollection, and after due investigation of all my records.


John Kobylt

11/22/04
Dated

Sworn and subscribed to
Before me this 22nd day of
November, 2004


Notary Public



My Commission expires: Oct 21, 2006

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